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March 22, 2005

VIA ELECTRONIC SUBMISSION

Ms. Hillary DeNigro
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: **Ex Parte Presentation**
Petition for Declaratory Ruling or Waiver of OSS Same Access
Requirement, CC Docket Nos. 95-20 and 98-10

Dear Ms. DeNigro:

I am writing to correct several misstatements of law and fact contained in EarthLink's March 15, 2005, letter in the above-referenced matter.¹ Before turning to those misstatements, SBC reiterates its firm belief that ASI is not subject to the *Computer III* requirements and that EarthLink's claims as to the substance of those requirements are thus irrelevant to ASI. Nevertheless, EarthLink has misstated the *Computer III* requirements and also presents a misleading and inaccurate account of the statements made by SBC at the March 1 meeting with the Enforcement Bureau. SBC files this letter to correct the record.

First, EarthLink contends that the Commission's OSS same access requirement was an ONA requirement, not a CEI requirement, and therefore cannot be superseded by comparably efficient interconnection as set forth in a CEI plan.² This is nonsense. As I noted in my March 2, 2005 letter³ – and as EarthLink makes no effort to rebut – even as the Commission established the OSS same access requirement, the Commission made clear that it would remain in place only “until the BOCs [could] demonstrate that indirect access and direct access to [OSS] are *comparably efficient*,” and it further invited “BOCs [to] demonstrate comparability *on a service-*

¹ See Ex Parte Letter from Mark J. O'Connor and Jennifer L. Phurrough on behalf of EarthLink, Inc., to Hillary De Nigro, Enforcement Bureau, FCC, CC Docket Nos. 95-20 and 98-10 (Mar. 15, 2005) (“EarthLink Letter”).

² See *id.* at 2-3.

³ See Ex Parte Letter from Gary L. Phillips, SBC, to Marlene H. Dortch, FCC, CC Docket Nos. 95-20 and 98-10 (Mar. 2, 2005).

*specific basis, consistent with CEI standards.*⁴ CEI plans are “service-specific.” ONA plans are not. By inviting BOCs to demonstrate that their OSS gateways were comparably efficient “on a service-specific basis,” the Commission necessarily invited them to do so in connection with their CEI filings.

Apart from being inconsistent with Commission precedent, moreover, EarthLink’s argument is based on a basic misunderstanding of ONA. ONA was developed to require BOCs to unbundle elements for use by competing ISPs, *irrespective of whether those elements were used by the BOC*. CEI, by contrast, was developed to ensure that, where a BOC used underlying basic services to support its enhanced services, those basic services would be available to unaffiliated ISPs on a nondiscriminatory, comparably efficient basis. Indeed, the Commission language on which EarthLink relies confirms this point. As EarthLink concedes, “ONA is intended to give competing ISPs the ability to “pick and choose” network service elements *which are not necessarily used by the BOC in providing its own information service.*”⁵ A requirement that unaffiliated ISPs receive “the same access” to a network element is not an independent right of access, such as is provided through ONA. It is simply a nondiscrimination requirement, which, for *Computer III* purposes, means a requirement to provide comparably efficient access. The Commission’s chosen vehicle for demonstrating comparable efficiency on a service-specific basis was the CEI plan. Thus, when the Commission authorized BOCs to demonstrate comparability of alternative forms of OSS access “on a service-specific basis, consistent with CEI standards,” it necessarily was inviting BOCs to make that showing in their CEI filings.

EarthLink contends that this result “reverse[s] the . . . burden,” by forcing ISPs to litigate whether a BOC’s OSS access is comparably efficient, rather than requiring the BOC to demonstrate such comparability prior to eliminating same access.⁶ But the Commission itself reversed that burden when it held, subsequent to the *BOC ONA Reconsideration Order*, that BOCs need no longer obtain advance approval of their CEI plans and that claims of discrimination should be raised in the section 208 process. EarthLink does not even purport to show why the Commission would choose to treat OSS access differently from every other network element with respect to CEI requirements, nor, in any event, does EarthLink present any facts showing the absence of comparable efficient access.

Second, EarthLink caricatures SBC’s reliance on the Commission’s section 271 precedent as a contention “that the Commission acted *sub silentio* to retract express rulings when they subsequently fell out of favor with the BOCs.”⁷ SBC’s argument is, of course, quite different. As SBC has explained – and as EarthLink does not dispute – the Commission has

⁴ Memorandum Opinion and Order on Reconsideration, *Filing and Review of Open Network Architecture Plans*, 8 FCC Rcd 97, ¶ 4 (1993) (“*BOC ONA Reconsideration Order*”) (emphasis added).

⁵ EarthLink Letter at 3 n.5 (quoting Report and Order, *In the Matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, 14 FCC Rcd 4289, ¶ 14 n.46 (1998)) (emphasis added).

⁶ See *id.* at 2.

⁷ *Id.* at 3.

interpreted the 1996 Act to require ILECs to provide OSS access to CLECs, pursuant to a nondiscrimination standard that the Commission has interpreted to be *stricter* than the nondiscrimination standard behind the *Computer Inquiry* rules (including the OSS same access requirement). And, as SBC has also explained – and as EarthLink again fails to dispute – the Commission has made clear that this stricter standard does not require ILECs to provide CLECs with the “same” OSS access the ILECs provide themselves. Rather, ILECs must provide CLECs with OSS access that is sufficient to provide CLECs a “meaningful opportunity to compete,” a standard that ILECs satisfy – as repeatedly confirmed by the FCC itself in its section 271 orders – by providing mediated OSS access. The point, then, is that, if the stricter nondiscrimination obligation imposed by the 1996 Act does *not* justify “same” OSS access – which EarthLink appears to concede – than it cannot be that the lesser obligation on which the *Computer Inquiry* rules are grounded necessarily *does* require such access. EarthLink’s purported same access requirement, and its position that the Commission must hold firm to this requirement, is thus hopelessly out of step with dozens of subsequent Commission decisions.

Finally, and perhaps most egregiously, EarthLink asserts that, at the March 1, 2005 meeting with Commission staff, SBC “represented” that SBC’s affiliated ISP, SBC IS, “currently has access to a maintenance *function* that is not available to unaffiliated ISPs.”⁸ That is false. At the meeting in question, SBC explained that SBC IS has access to a single maintenance *system* that is not available to unaffiliated ISPs.⁹ At the same time, SBC also explained that it provides unaffiliated ISPs, including EarthLink, access to a separate maintenance system that provides the *exact same functionality* on a comparably efficient basis as the system to which SBC IS has access. SBC further explained, moreover, that it provides unaffiliated ISPs, including EarthLink, reports documenting the provisioning and repair intervals provided to those ISPs, and that compare those intervals to the intervals experienced by SBC IS. Thus, if the system access in question resulted in inferior service for EarthLink than that received by SBC IS, those reports would document it.

This last point is critical. What is most striking about EarthLink’s letter – and, indeed, about all of its submissions in this matter – is the utter absence of any indication that SBC has provided service to EarthLink that is in any meaningful way inferior to the service it provides to SBC IS. If that were the case – if, for example, SBC IS’s access to the maintenance system described above and at the March 1 meeting led to better service or somehow undermined EarthLink’s ability to compete – EarthLink has the data to prove it. The fact that EarthLink has not even attempted to do so speaks volumes.

⁸ EarthLink Letter at 4 (emphasis added).

⁹ Contrary to EarthLink’s claim, SBC also did not state that in the future SBC IS will have access to additional OSS functions not available to unaffiliated ISPs. *See id.* What SBC did say is that its plans for further integration were unclear but that its affiliate *might* be given direct access to additional systems to which unaffiliated ISPs have mediated access, but that, notwithstanding the inapplicability of *Computer III*, no such direct access would be provided to SBC IS unless unaffiliated ISPs received nondiscriminatory mediated access to the same functionalities.

Hillary DeNigro
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Pursuant to section 1.1206(b) of the Commission's rules, this letter is being filed electronically. I ask that it be placed in the record of the above-referenced proceedings.

Please contact me at 202-326-8910 should you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary J. Phillips". The signature is fluid and cursive, with a long horizontal stroke at the end.

cc: *(Via Hand Delivery & Electronic Mail)*

Ann Stevens
Christi Shewman
Lisa Griffin
A.J. DeLaurentis
Jodie Donovan-May
Mark J. O'Connor
Jennifer L. Phurrough